No. 09-1299

Supreme Court, U.S.
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In The
Supreme Court of the United States

DONNIE CLEVELAND LANCE,

Petitioner,

v.

HILTON HALL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

A. SHOULD THIS COURT DENY CERTIORARI REVIEW OF A CLAIM IN WHICH THE STATE COURT PROPERLY UTILIZED THIS COURT'S APPLICABLE PRECEDENT OF *STRICKLAND V. WASHINGTON* IN REJECTING A FACT-SPECIFIC ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL?

B. SHOULD THIS COURT DENY CERTIORARI REVIEW OF A CLAIM THAT WAS NOT RAISED IN THE COURT BELOW AND PRESENTS NO CONSTITUTIONAL QUESTION?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

On June 23, 1999, Petitioner, Donnie Cleveland Lance, was convicted of two counts of malice murder, one count of burglary and one count of possession of a firearm during the commission of a crime. The jury found the existence of numerous statutory aggravating circumstances and recommended two sentences of death. The Georgia Supreme Court affirmed the convictions and sentences on February 25, 2002. *Lance v. State*, 275 Ga. 11 (2002), *cert. den'd*, *Lance v. Georgia*, 537 U.S. 1050 (2002).

On May 29, 2003, Petitioner filed his state habeas corpus petition. An evidentiary hearing was held on August 28-30, 2006. The habeas court erroneously granted relief as to Petitioner's death sentence April 22, 2009. Respondent appealed the erroneous grant of relief and Petitioner cross-appealed. Following the filing of briefs and oral argument, the Georgia Supreme Court reversed the erroneous grant of relief and reinstated Petitioner's sentences. *Hall v. Lance*, 286 Ga. 365 (2010).

II. STATEMENT OF THE FACTS

On direct appeal, the Georgia Supreme Court found the evidence at trial established the following:

> The bodies of the victims were discovered in Butch Wood's home on November 9, 1997.

Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 ½ EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding

Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered

> carrying a sawed-off shotgun, and loaded the chamber of the shotgun.

Lance, 275 Ga. 12-13.

On appeal from the erroneous grant of state habeas corpus relief, the Georgia Supreme Court found the evidence establishes the following:

> The evidence at trial showed that Lance had a long history of abusing Joy Lance both before and after they divorced, including kidnapping her, beating her with his fist, a belt, and a handgun, strangling her, electrocuting her with a car battery, and threatening her with a flammable liquid, handguns, and a chainsaw. He had repeatedly threatened to kill her himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood. Lance kicked in the door of Butch Wood's home in 1993 armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore, Lance's friend who was accompanying Lance that night.
>
> Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. Lance arrived at Butch Wood's home, kicked in the front door, shot Butch Wood on the front and the back of his body

> with a shotgun, and then beat Joy Lance to death by repeatedly striking her in the face with the butt of the shotgun, which broke into pieces during the attack. Joy Lance's face was rendered utterly unrecognizable. Later that morning, Lance told his friend, Joe Moore, that Joy Lance (whom Lance referred to in a derogatory manner) would not be coming to clean Lance's house that day; that Butch Wood's father could not "buy him out of Hell"; and that both Joy Lance and Butch Wood were dead. Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance bragged to the inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall."

Hall v. Lance, 286 Ga. at 366.

III. DENIAL OF SPECIFIC "FACTS" SET OUT IN THE PETITION

All Experts Did Not Agree Significant Mental Impairments

Contrary to Petitioner's assertions to this Court, all of the experts who testified at the habeas hearing did not agree that the Petitioner suffers from "mental impairments that render him borderline mentally retarded. . . ." (Petition, pp. 11, 13). In fact, Dr. Daniel Martell testified that Petitioner's IQ score of 79 placed Petitioner in the range higher than mild mental retardation and just one point away from being in the low average range. Also, Dr. Thomas Hyde

administered a cognitive screening test, on which the Petitioner scored "very well," and conceded that Petitioner received a "normal score" on this cognitive functioning test. Further, on cross-examination, Dr. Hyde explained, with regard to the frontal lobe dysfunction, that although he gave Petitioner a "fairly extensive neurological examination," over 100 tests, Petitioner performed "normally" on all the tests with the exception of the tapping of the forehead test (glabellar reflex). Dr. Hyde conceded that other tests "assay the function of the cognitive portion of the frontal lobe. And of those, [the glabellar reflex] was the only one that showed any abnormalities. . . ." Accordingly, Petitioner's own experts disagree on Petitioner's level of cognitive functioning. What is clear is that Petitioner was able to run his own business, was a successful mechanic and supported his ex-wife and children until his arrest for the murders in the instant case.

No Records To Review

Petitioner asserts that trial counsel did not review "available medical records regarding petitioner's repeated head traumas" and did not review records pertaining to Petitioner's "hospitalization for mental health treatment." (Petition, p. 8). However, there are no records of Petitioner's "head traumas," except for the gun shot wound to the head. That shot traveled under the skin along the skull and, although Petitioner went to the emergency room, he left after a few hours. Further, the only mental health records were

from East Central Regional Hospital, when Petitioner was being held in Jackson County for the kidnapping and aggravated assault of Joy Lance in 1994 at Christmas, and he claimed he was depressed, so he was referred for mental health treatment.

Experts Agreed On Petitioner's Ability To Commit Crime

Further, although Petitioner argues that the experts found that Petitioner could not have organized and committed the crime, the record shows that Dr. Hyde also conceded on cross-examination that a person with the Petitioner's frontal lobe dysfunction: would be able to make a telephone call to check on the location of his children and be sure they were not present at the impending murder scene; would know how to load a weapon that he had used before; would know how to operate a weapon; would know how to kick in a door as he had done before; would know how to fire a weapon at a person as he had done before; would know how to get into a physical fight with someone as he had done before; and he would know how to hit someone with a weapon to cause injury. Thus, contrary to his direct examination, Dr. Hyde ultimately conceded that Petitioner was capable of committing the crimes for which he has been convicted as Petitioner had previously performed all these acts.

Further, the state habeas court also noted that Dr. Ricardo Weinstein "did not conclude that

Petitioner could not have planned and/or committed the crimes," (State Habeas Order, p. 60), thereby corroborating Dr. Hyde's implicit concession. Moreover, the evidence at trial showed that Petitioner had committed an almost identical crime previously, but was identified at the scene just prior to anyone being shot.[1] Accordingly, it is clear that Petitioner was capable of committing these murders.

Experts Found Petitioner Could Conform His Actions To The Law

Dr. Martell concluded that Petitioner had *minor* brain dysfunction that did not affect his executive functioning which controlled his ability to plan or his executive function of impulse control. Dr. Martell further testified that Petitioner had: the ability to inhibit unwanted behavior; the ability to problem solve; the ability to inhibit impulsive responding; and verbal reasoning. Specifically, Dr. Martell testified that it was his opinion that Petitioner's "ability to inhibit unwanted or impulsive behaviors appears to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime

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[1] As set forth above, in 1993, Petitioner, believing Butch Wood was romantically involved with Joy, had kicked in the door of Wood's home, "entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun." *Lance*, 275 Ga. 13. Before Petitioner could enter the bedroom where Wood was asleep, he abandoned the crime and ran from the home when Wood's son awoke and identified the person with Petitioner.

itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses." (HT 593).

No "Significant" Changes In Petitioner After Gun Shot Wound

Petitioner asserts that the witnesses testified that the gun shot wound "significantly affected petitioner's behavior" and that he "was different after he got shot in the head." (Petition, p. 11). However, the record shows only that Petitioner's father testified by affidavit that Petitioner was "more quiet" and had headaches after the gun shot and Petitioner's two sisters testified only that Petitioner had headaches after the gun shot. They did not testify to a change in Petitioner's behavior.

Additionally, Petitioner's expert, Dr. Weinstein, testified that Petitioner's actions demonstrated that he had a lack of impulse control before the 1993 gun shot wound and there was no change in the relationship dynamic between the Petitioner and Joy Lance after the 1993 head injury.

Additionally, a witness who went to school with the Petitioner from first through twelfth grade, testified that he did not observe Petitioner acting differently after the 1993 head injury. That witness had contact with the Petitioner after high school and Petitioner remained self-confident and outgoing.

IV. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DENY CERTIORARI REVIEW AS THE STATE COURT PROPERLY UTILIZIED THIS COURT'S APPLICABLE PRECEDENT OF *STRICKLAND V. WASHINGTON* IN REJECTING A FACT-SPECIFIC ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Georgia Supreme Court properly utilized *Strickland v. Washington*, 466 U.S. 688 (1984), in reversing the erroneous grant of state habeas relief and correctly determined that Petitioner had failed to establish prejudice based on trial counsel's investigation and presentation of mitigation evidence. Accordingly, this case presents no issue warranting this Court's review.

On appeal, the Georgia Supreme Court found that trial counsel performed deficiently under a *Strickland* analysis with regard to their investigation into Petitioner's background. *Lance*, 286 Ga. 367. The court then held:

> The question then before us is whether trial counsel's deficient performance in failing to adequately investigate issues beyond guilt and innocence, when considered together with any other deficiencies in trial counsel's performance at trial, in reasonable probability changed the outcome of Lance's trial. We hold as a matter of law that it did not.

Lance, 286 Ga. at 368.

Initially, in assessing prejudice, the Georgia Supreme Court held that, if counsel had conducted a proper investigation, it was "doubtful that this information would have led reasonable counsel to seek a psychological evaluation for Lance, particularly given the reasonableness of trial counsel's stated desire to prioritize his request for funds for various experts." *Lance*, 286 Ga. at 369. The court also held that the trial court would not have abused its discretion in denying a request for funds for a psychological evaluation if counsel had asked as the information Petitioner presented in his state habeas did not establish "that the assistance of a psychologist was critical to Lance's defense." *Id.* The state habeas court predicated this finding partly on the fact that Petitioner had "already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than Lance's alcohol abuse and his failure to adjust to his divorce." *Id.* The court concluded:

> Given the multiple levels of unlikelihood at issue here – that reasonable counsel would seek an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full neuropsychological examination – we conclude that there is no reasonable probability that a reasonable investigation of Lance's background by counsel would have led to his having access to the type of specialized

> neuropsychological testimony that Lance has presented in the habeas court.

Lance, 286 Ga. at 370.

The Georgia Supreme Court also found that Petitioner's evidence of his "moderate slowness" would not have, in reasonable probability, changed the outcome of the trial in light of the evidence he "functioned normally in society apart from his criminal behavior." *Id.*

The Georgia Supreme Court then conducted a second *Strickland* prejudice analysis presuming Petitioner would have been able to obtain an extensive neuropsychological examination based on the evidence he presented in the state habeas proceedings. *Lance*, 286 Ga. at 370-373. Under this presumption, the court reviewed the testimony of the mental health experts that testified in the state habeas proceedings. The court then concluded:

> Given Lance's long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward, we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if it had been presented at

> Lance's trial. Compare *Porter v. McCollum*, *supra*, U.S. (III) (130 S. Ct. at 453-456).
>
> We also conclude, contrary to Lance's arguments in his cross-appeal, that the new evidence of subtle neurological impairments would not have significantly affected the jury's deliberations during the guilt/innocence phase. Given the weakness of the new mental health evidence and the overwhelming evidence of the intentional and deliberate nature of Lance's crimes, we conclude that it is essentially beyond possibility that the jury would have failed to convict Lance of the murders. We further conclude that it would have been highly unlikely that the new mental health evidence would have led the jury to render a verdict of guilty but mentally ill, which would not foreclose a death sentence in any event. *See* OCGA § 17-7-131(a)(2) (defining "[m]entally ill"). *See also Lewis v. State*, 279 Ga. 756, 764 (12) (620 SE2d 778) (2005) (holding that "the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as the result of such a verdict").

Lance, 286 Ga. at 373.[2]

A mere fact-specific application of these standards, with which result Petitioner disagrees,

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[2] As set forth above in Respondent's "Denial", these findings of fact by the Georgia Supreme Court are supported by the record.

presents nothing warranting review by this Court. As this Court stated in *United States v. Johnson*, 268 U.S. 220, 227 (1925), "We do not grant certiorari to review evidence and discuss specific facts." *See also Texas v. Mead*, 465 U.S. 1041 (1984). This Court also reiterated in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), that this Court's certiorari review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

The Georgia Supreme Court clearly conducted a proper *Strickland* prejudice analysis and concluded that had Petitioner presented the same weak mitigation evidence at trial that he submitted in the state habeas proceedings, there was no reasonable probability of a different outcome. This analysis is in direct accordance with *Strickland*. Petitioner's mere disagreement with the factual resolution of his claims by the Georgia Supreme Court does not present a question worthy of this Court's exercise of its certiorari jurisdiction. Accordingly, this Court should deny the petition.

B. PETITIONER'S CLAIM THAT THE ABA GUIDELINES REQUIRE TWO ATTORNEYS TO BE APPOINTED IN DEATH PENALTY CASES WAS NOT RAISED IN THE COURT BELOW, AND ALTERNATIVELY, PRESENTS NO CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW.

Petitioner asks this Court to grant certiorari to mandate that the courts conform to the ABA Guidelines and require the appointment of two attorneys in all death penalty cases. However, Petitioner did not raise this claim in his cross-appeal to the Georgia Supreme Court.[3] Accordingly, this claim is not properly before this Court for review. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Youakim v. Miller*, 425 U.S. 231 (1976).

Additionally, even if Petitioner had raised this claim below, it fails to present a constitutional question to this Court as the ABA Guidelines are merely guides. *Strickland*, 466 U.S. at 689.[4]

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[3] Petitioner did argue that the trial court should have appointed co-counsel under the ABA Guidelines, but only as part of Petitioner's argument that trial counsel was rendered deficient. Petitioner did not argue the appointment of a second attorney in death penalty cases is constitutionally required.

[4] Also of note, Georgia's Unified Appeal Procedure (UAP) did not become effective until January 27, 2000, whereas Petitioner's trial was held in January of 1999. Based on its express effective date, at the time of Petitioner's trial Georgia's UAP did not mandate the appointment of additional counsel to represent

(Continued on following page)

Finally, even if the claim properly presented any constitutional question to this Court, the Georgia Supreme Court's analysis that Petitioner was not prejudiced was in direct accordance with this Court's applicable precedent of *Strickland*. Accordingly, the Georgia Supreme Court properly followed this Court's legal precedent and properly found Petitioner had failed to establish prejudice.

This Court should deny Petitioner's petition for certiorari review of this claim.

Petitioner, especially where counsel was originally retained, as in Petitioner's case.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review of the judgment of the state court.

Respectfully submitted,

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